(10)

No. 94-1175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
AND
BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

H. RODGIN COHEN
ROBIN D. FESSEL
SULLIVAN & CROMWELL
Of Counsel

NORMAN R. NELSON
General Counsel
The New York Clearing House Association
Of Counsel

PHILIP L. GRAHAM, JR.
Counsel for The New York Clearing House Association, Amicus Curiae
125 Broad Street
New York, New York 10004.
(212) 558-4000

August 31, 1995

16pp

IN THE

Supreme Court of the United States

October Term, 1994

No. 94-1175

♦

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

♦

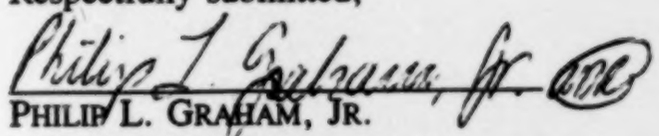
MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The New York Clearing House Association respectfully moves pursuant to Rules 21 and 37.1 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* supporting the petitioner. The petitioner has consented to the filing of the brief, but respondent has declined to consent.

The decision of the Court of Appeals for the Seventh Circuit, which denies banks access to federal courts in interbank disputes arising under the Expedited Funds Availability Act, raises a question of substantial importance to Clearing House members and, if allowed to stand, will substantially and adversely affect them. For that reason, and as more fully stated in the brief under the heading "Interest of *Amicus Curiae*," the members of the Clearing House have a vital and continuing interest in the outcome of this action.

The Clearing House therefore prays that the Court grant this motion for leave to file its brief.

Respectfully submitted,



PHILIP L. GRAHAM, JR.
Counsel for The New York Clearing House Association,
Amicus Curiae
125 Broad Street
New York, New York 10004.
(212) 558-4000

August 31, 1995

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Other Authorities

IN THE
Supreme Court of the United States
October Term, 1994

No. 94-1175

♦

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

♦

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amicus Curiae*

The New York Clearing House Association (the "Clearing House") is an association of eleven leading commercial banks in the City of New York.[1] Through its check clearing

---

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank National Association, European American Bank and Republic National Bank of New York.

operations, the Clearing House clears daily an average of about 3 million checks, aggregating approximately $20 billion. The ability of the Clearing House and its member banks to process these checks efficiently and at the lowest cost to consumers depends in large part on uniform rules of law and accessible dispute resolution procedures.

The Clearing House regularly appears as *amicus curiae* in cases raising significant questions of law relating to banking. The decision of the Court of Appeals for the Seventh Circuit in this case raises such a question by threatening to create uncertainty and inconsistency in the resolution of check clearance disputes. The Clearing House banks believe that, if allowed to stand, the decision will unreasonably and unfairly affect the ability of the Clearing House banks and others to obtain uniform guidance and evenhanded justice in disputes arising out of the federal law governing the interbank check payment system.

Summary of Argument

The decision below erroneously deprives banks of access to the federal courts in civil disputes arising under and governed by federal law. Petitioner's claim against Respondent in this case arose under the Expedited Funds Availability Act ("EFAA"), 12 U.S.C. §§ 4001-4010, and the regulations promulgated thereunder. The district court thus presumptively had federal question jurisdiction of the case under 28 U.S.C. § 1331, unless EFAA displaced § 1331 with respect to interbank disputes. Nothing in EFAA or its legislative history suggests that Congress intended such an extraordinary displacement. To the contrary, the plain language of EFAA confirms the availability of the federal courts for resolution of disputes such as this one, arising under regulations adopted by the Board of Governors of the

Federal Reserve System (the "Board") pursuant to its statutory rulemaking authority.

The Court of Appeals' decision to close the doors of the federal courts to litigants seeking to resolve rights and liabilities arising under federal law and a federal regulatory scheme would also result in bifurcation of disputes arising from a single occurrence, creating judicial inefficiency, lack of uniformity, unnecessary procedural complexity and the potential for unfairly inconsistent adjudications. It is inconceivable that Congress intended to create such a result, particularly in legislation designed to create uniform standards of conduct.

ARGUMENT

The District Court Has Jurisdiction of This Case.

A. Background

Section 4010(f) of EFAA authorizes the Board to establish rules allocating loss and liability among depositary institutions for matters arising under the funds availability system implemented by EFAA. Pursuant to that authority, the Board has promulgated regulations governing interbank payment system liabilities, creating a uniform federal standard for the conduct of banks participating in the payment system and for determining their liability to each other and to their customers. 12 C.F.R. § 229.38. To the extent inconsistent with state law, these regulations are preemptive. 12 U.S.C. § 4007(b); 12 C.F.R. § 229.41.

The same statutory section that authorized the Board to adopt liability-creating regulations also provided that "any action under this section may be brought in any United States District Court, or any other court of competent jurisdiction . . . ." 12 U.S.C. § 4010(d). Applicability of this jurisdictional provision to interbank disputes has been

confirmed by the Board in its capacity as the agency principally charged with administering the statute. 12 C.F.R. 229.38(g). *See K-Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (unless agency interpretation conflicts with plain language of statute, court should defer to agency).

Petitioner's principal brief shows in detail how the plain language of § 4010(d) establishes federal court jurisdiction for the resolution of interbank disputes governed by regulations promulgated under § 4010(f). As set out hereafter, the general jurisprudence regarding federal question jurisdiction strongly reinforces Petitioner's position.

B. Petitioner's Claim Raised a Federal Question Presumptively Litigable in Federal Court.

In 28 U.S.C. § 1331 Congress provided that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." Section 1331 is the long established means by which an immense range of federally created and protected rights and obligations come to be litigated in the federal court system. It is a chief bulwark of support for the proposition that the federal courts should be open to litigants with federal claims or whose conduct will be judged under federal law and regulation. *See Powell* v. *McCormack*, 395 U.S. 486, 515 (1969) (purpose of § 1331 was to "provide a broad jurisdictional grant to the federal courts"). This action falls squarely within this purpose.

Petitioner claimed in the district court that Respondent was liable to it for having violated the standards of 12 C.F.R. § 229 promulgated by the Board under EFAA. As contemplated by Section 4010(d) of EFAA, these regulations, among other things, set uniform federal standards for allocating liability among banks in connection with disputes over funds availability. The lower courts have held, and commentators have concurred, that regulations such as these, promulgated

pursuant to Congressional authorization, are "laws" for purposes of § 1331. *See, e.g., Chasse* v. *Chassen*, 595 F.2d 59, 61 (1st Cir. 1979); *Murphy* v. *Colonial Federal Savings and Loan Ass'n*, 388 F.2d 609, 611 (2d Cir. 1967); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3, 7 (3d Cir. 1964); *see also* 13B Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3563, at 51 (2d ed. 1984). *Cf. United States* v. *Mersky*, 361 U.S. 431, 437-38 (1960) ("Once promulgated, these regulations, called for by the statute itself, have the force of law . . . .").

Congress' intention to provide broadly for a federal judicial forum to resolve claims that arise under federal law was underscored in 1980, when Congress amended § 1331 to remove the jurisdictional requirement that the amount in controversy exceed $10,000. The accompanying House Report states that the amendment

> resolves the anomolous [sic] situation faced by persons who, although their Federal rights have been violated, are barred from a Federal forum solely because they have not suffered a sufficient economic injury. It represents sound principles of federalism by mandating that the *Federal courts should bear the responsibility of deciding all questions of Federal law.*

H.R. REP. NO. 1461, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5063, 5063 (emphasis added). This Court has recognized that the federal courts are presumptively available for the vindication of federal rights:

> The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a

> reasonable foundation, the District Court has jurisdiction . . . .

Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921).

The district court thus had jurisdiction of this case unless EFAA or its legislative history indicates a Congressional intent to displace § 1331 in cases involving interbank claims under EFAA regulations. *See Rosado* v. *Wyman*, 397 U.S. 397, 422 (1970). As shown hereafter, the statute does no such thing.

C. The Seventh Circuit's Decision Is Contrary to the Plain Language of EFAA.

Far from evidencing a congressional intent to limit federal jurisdiction, Subsection 4010(d) of EFAA expressly provides that the district courts shall have jurisdiction—concurrently with other courts of competent jurisdiction—of all actions brought under "this section." Although the Court of Appeals held that subsection (d) of 4010 applies only to claims brought under subsection (a), the "section" referred to in subsection (d) logically can only be section 4010 in its entirety, not just a single *sub*section to which no specific reference is made. Nothing in the legislative history of EFAA indicates that in enacting subsection 4010(d) Congress intended anything other than this plain meaning. There is thus no basis in the statute or its history to conclude that EFAA displaced the presumptive grant of federal court jurisdiction under § 1331.

Nor does the statute or its history support the notion that Congress mandated, *sub silentio*, a Board-created administrative tribunal to adjudicate private disputes between banks.[2] Nothing in EFAA authorizes the Board to establish an administrative process for resolution of private party claims, and in the absence of express authorization the Board has no authority to take such action. *See Coit Independence Joint Venture* v. *Federal S&L Ins. Corp.*, 489 U.S. 561, 573-74 (1989). Subsection 4009(c)(i) of EFAA, on which the Court of Appeals principally relied, applies only to regulatory enforcement, not private civil actions. Although the Court of Appeals argued that subsection 4010(f) "bolstered" its conclusion, that provision says nothing about administrative adjudication. Entitled "Authority to establish rules regarding losses and liability among depositary institutions," Section 4010(f) authorizes the Federal Reserve to establish the *rules* of interbank liability. The *forums* in which disputes are to be brought are separately specified in subsection 4010(d).[3]

A review of the regulations promulgated by the Board confirms that, notwithstanding its broad statutory mandate and responsibility for the nation's financial system and bank regulation, the Board has no administrative tribunals for

---

[2] The Court of Appeals expressly held only that the district court did not have jurisdiction under § 4010(d), leaving open the implausible possibility of concurrent jurisdiction of state courts and a (nonexistent) federal administrative tribunal. The court's reasoning, however, makes clear that it considered that Congress had given the Board exclusive jurisdiction of interbank EFAA claims, at least at the federal level.

[3] Brushing aside the Board's statement that it had no mechanism for adjudicating interbank disputes, the Court of Appeals stated that "the Board's differing interpretation of the statute cannot confer jurisdiction upon the court." Pet. App. 25a. This conclusion misses the point that jurisdiction exists—under 28 U.S.C. § 1331—unless EFAA otherwise provides.

resolution of any private claims. It is highly improbable that Congress would have mandated an innovation of this magnitude without any explicit statement in the statute, without any indication of its intention in EFAA's legislative history, and without any record of consultation with the Board.

D. The Seventh Circuit's Decision May Cause Judicial Inefficiency and Unfairness by Requiring That Interdependent Claims Be Resolved in More Than One Forum.

Even apart from the importance of permitting the vindication of federal rights in federal courts, the Court of Appeals' denial of jurisdiction over interbank disputes creates the risk of judicial inefficiency and inconsistency that exists whenever related and interdependent suits are litigated in multiple forums. In many cases, a delay by a depositary bank in making funds available to a customer will give rise both to a claim against the bank by its customer, and by the bank against a second bank, most likely a paying bank as defined in 12 C.F.R. § 229.2(z). Liability of the depositary bank to its customer and of the paying bank to the depositary bank may well turn on the same factual questions: for example, whether the funds were made available on a timely basis (*see* 12 C.F.R. § 229.10(c)), whether the account is a "new account" thereby excusing compliance with certain provisions of the regulations (*see id.* § 229.13(a)), or whether noncompliance is excusable because the depositary bank acted with appropriate diligence in emergency conditions (*see id.* § 229.13(f)).

If separate proceedings are required to resolve all claims and cross-claims relating to a funds availability dispute, common fact questions might have to be litigated twice and with inconsistent results. This could lead to the injustice of a depositary bank being found liable to its customer, but being

unable to obtain indemnity or contribution from the responsible paying bank because of the anomaly that a different factfinder reached inconsistent conclusions about the same underlying facts.

It is precisely to avoid the inefficiency of multiple adjudications and the potential unfairness of inconsistent results that the Federal Rules of Civil Procedure have long permitted the adjudication of all claims arising from a common nucleus of facts in a single proceeding. *See, e.g.*, Fed. R. Civ. P. 14; *Colton* v. *Swain*, 527 F.2d 296, 299 (7th Cir. 1975); *Dery* v. *Wyer*, 265 F.2d 804, 808-09 (2d Cir. 1959). The Court of Appeals' decision effectively repeals Rule 14 for depositary banks sued under EFAA, requiring that they defend themselves against customer claims in one forum and then seek compensation under the same regulatory scheme in another forum with no assurance of consistent results. Moreover, the second forum—as envisioned by the Court of Appeals—will be either a nonexistent Board tribunal or a state court system incapable of assuring uniform application of this federal regulatory scheme.

Nor would a federal district court be permitted to remedy this uneconomic and potentially unjust result by assertion of supplemental jurisdiction over a depositary bank's third party claim. The grant of supplemental jurisdiction under 28 U.S.C. § 1367 is not applicable when "expressly provided otherwise by Federal statute." 28 U.S.C. § 1367(a). Under the Court of Appeals' interpretation of EFAA, Congress has "expressly provided" that the district courts shall not have jurisdiction over interbank claims asserted under EFAA. Thus, the same erroneous reasoning that would exclude federal question jurisdiction in the first instance would prevent invocation of 28 U.S.C. § 1367 to ameliorate the resultant inefficiency and hardship.

Conclusion

The judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

PHILIP L. GRAHAM, JR.
Counsel for The New York Clearing House Association,
Amicus Curiae
125 Broad Street
New York, New York 10004.
(212) 558-4000

August 31, 1995